

Alert | Labor & Employment



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Labor Department Proposes Increasing Salary Threshold for Overtime Pay

Go-To Guide:

- The Wage and Hour Division (WHD) of the U.S. Department of Labor (DOL) released a Notice of Proposed Rulemaking (NPRM) that would increase the salary threshold under which employees are eligible for overtime pay under federal labor law to \$55,068.
- The proposed rule would increase the total annual compensation threshold for highly compensated employees to approximately \$143,988 per year.
- The final rule may contain different salary thresholds, as the amounts are based upon wage data that may change prior the promulgation of the rule.
- Employers should begin review of their workforce strategies and assess the financial and practical impact of the NPRM if implemented as proposed.

Introduction and Background

On Aug. 30, 2023, the WHD of the DOL released a **NPRM** that proposes to revise the “white collar” overtime exemption regulations applicable to executive, administrative, and professional employees. Most notably, the highly anticipated proposal seeks to raise the salary threshold under which employees are eligible for overtime pay under federal labor law to \$1,059 per week (\$55,068 annualized).

By way of background, to qualify for the “white collar” exemptions, each of the following tests must be met:

1. **The salary-basis test:** The employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed;
2. **The salary-level test:** The amount of salary paid must meet a minimum specified amount (currently \$684 per week, or \$36,568 per year); and
3. **The duties-test:** The employee’s job duties must primarily involve executive, administrative or professional duties as defined by the regulations.

The DOL’s proposed rule, “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees,” would increase the standard salary level to the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (currently the South). Using data from 2022, the DOL reports that using this metric will increase the salary threshold to \$1,059 per week (\$55,068 annualized) from the current \$684 per week (\$35,568 annualized). The DOL estimates that this rule change would extend overtime payments to approximately 3.6 million salaried workers.

Notably, however, the DOL also states that when it promulgates the final rule it will use the most recent wage data available; thus, the salary threshold stated in the current NPRM may not be the threshold of the final rule. The DOL projects that by the fourth quarter of 2023, the salary threshold could be as high as \$1,140 per week (\$59,285 annualized), and that by the first quarter of 2024, the salary threshold could be as high as \$1,158 per week (\$60,209 annualized).

The proposed rule would also increase the total annual compensation threshold for highly compensated employees – an exemption that relaxes the duties-test for such employees – from the current \$107,432 per year to the 85th percentile of salaried workers nationally, which is currently \$143,988 per year.

In addition, the proposal includes an automatic escalator provision that updates the standard salary employee threshold and the highly compensated employee threshold every three years using “current wage data.” While reserving the option to suspend such increases if economic conditions warrant such, the DOL would publish a notice in the Federal Register no fewer than 150 days prior to each automatic update stating the updated amounts required under the regulations. The proposed rule would also restore, with some exceptions, overtime protections for U.S. territories subject to federal minimum wage law.

The proposed rule would not make any changes to the Fair Labor Standards Act’s “duties test” for determining overtime eligibility.

Procedural Next Steps

Once the proposal is published in the Federal Register, a comment period will open for at least 60 days, during which time various stakeholders such as industry associations and employers may weigh in with their thoughts, concerns, and questions related to the proposed rule. After taking all comments into account, the DOL will then issue a final rule, likely to become law sometime in 2024.

During the comment period, and potentially subsequent to the comment period, certain business groups or states may file litigation to enjoin the rule from becoming law. The U.S. Chamber of Commerce already

has announced that it is preparing to engage in this rulemaking process, and is seeking feedback from its members regarding the kind of impact the new salary threshold (and other projected levels) would have on their operations.

The current overtime exemption salary threshold, implemented under the Trump administration, is already being challenged in a Texas federal court. The overtime rule instituted under the Obama administration, which sought to raise the salary threshold to \$47,476, was invalidated by a Texas federal court prior to that rule going into effect. That court held that the Obama-era salary threshold was set so high that it rendered the duties piece of the exemption test irrelevant, and expanded protections to workers Congress sought to exclude. When adjusted for inflation, the salary threshold proposed this time is lower than the proposed Obama administration salary threshold.

Nevertheless, opponents of the new rule may rely upon the Texas federal court ruling in seeking to enjoin the latest proposal. Further, opponents of the new rule may also expand Justice Kavanaugh's dissent in *Helix Energy Solutions Group, Inc. v. Hewitt*, 598 U.S. 39 (2023), to argue that the DOL simply does not have the statutory authority to issue a salary-basis or salary-level test. Justice Kavanaugh had questioned "whether the Department's regulations – which look not only at an employee's duties but also at how much an employee is paid and how an employee is paid – will survive if and when the regulations are challenged as inconsistent with the Act." Justice Kavanaugh further commented that the regulations' focus on "how an employee is paid" was "dubious" and that he was "hard-pressed to understand why [that] would matter."

Employer Considerations

Despite the uncertainty as the proposed rule could be significantly altered – or even invalidated prior to becoming law – employers should prepare for the potential that the proposed rule becomes law.

In addition to reviewing current payroll compliance practices, employers may wish to assess their current workforce strategies to determine whether it is feasible to raise the salaries of certain exempt employees currently earning between \$35,568 and \$55,068 per year to the \$55,068 threshold, or to convert these employees to non-exempt status. Employers converting employees to non-exempt status should also consider whether they will allow employees to work and earn overtime, and otherwise how best to manage the monitoring and payment of overtime.

Managing employees who work overtime requires ensuring proper equipment and resources to track employee time worked, appropriate training of managers and supervisors as to scheduling and tracking time, and a creative approach regarding how best to staff certain projects. With many employees continuing to work remotely in certain sectors, it is important to assure monitoring of overtime. Further, as with any change in employee payroll practices, there needs to be appropriate communication with employees, to set proper expectations.

In addition to understanding the proposed federal rule, employers should review applicable state and local laws, many of which have higher salary thresholds or more stringent overtime requirements than federal law. For example, not every state recognizes the highly compensated employee exemption. Variations in state and federal minimum wage and overtime requirements, and the appropriate calculation of an employee's "regular rate of pay," are fundamental in making proper payment under the law. Failure to make proper payment can lead to local, state and federal wage and hour audits or investigations which may result in the payment of back wages and/or substantial fines and penalties. Employers who fail to comply with wage and hour obligations can also be subject to private single-plaintiff or collective and class action litigation. In such cases, the burden of proof is often on employers,

who need to show proper payment and recordkeeping. In certain states such as Massachusetts, failure to comply with the state's wage act can result in personal liability for officers, and even potential criminal liability.

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